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No. 780

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

DISTRICT OF COLUMBIA, *Petitioner*,

v.

THE SMOOT SAND & GRAVEL CORPORATION, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,
GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the District of Columbia, respectfully shows and represents unto your Honors that:

STATEMENT OF THE MATTER INVOLVED

Laws applicable to the District of Columbia, enacted by the Congress of the United States in the exercise of exclu-

sive jurisdiction over the District of Columbia pursuant to the Constitution of the United States, require that *all personal property* in the District of Columbia subject to taxation, *including vessels, ships and boats*, shall be listed and assessed for taxation at *not less than the full and true value thereof in lawful money.*

The respondent, a Delaware corporation having its only office, with exception of its statutory office in Delaware, in the District of Columbia, has, since 1927 when it was organized, owned various vessels and boats (consisting of dredges, launches, tugboats, and scows). The tugboats and many of the scows, during the fiscal years ended June 30, 1941, to June 30, 1945, inclusive, were daily used in the District. They were sent down the Potomac River from the District of Columbia to various sand and gravel deposits of the respondent in the Potomac River and its tributaries from which sand and gravel was brought back to respondent's storage places in the District of Columbia (R. 34-37).

The Assessor of the District of Columbia assessed personal property taxes for the fiscal years referred to above against respondent upon the basis of the full and true value of the tugboats and scows which were daily in the District and used in transporting its sand and gravel in and to the District of Columbia. **The Assessor did not include in such assessments any of respondent's dredges or any of its scows which were out of the District, sunk, or otherwise out of commission (R. 35, 36).**

The respondent appealed from the aforesaid assessments to the Board of Tax Appeals for the District of Columbia upon the principal ground that the vessels and boats assessed were not subject to taxation in or had any situs in the District of Columbia, permanent or otherwise (R. 7, 15).

The Board of Tax Appeals sustained the validity of the assessments, except with respect to certain scows (R. 42,

120, 121). Respondent petitioned the United States Court of Appeals for the District of Columbia Circuit for a review of the decision of the Board of Tax Appeals upon several grounds, one being the contention that imposition of tangible personal property taxes by the District of Columbia on the basis of 100% of value rather than on the basis of apportionment is in violation of the Constitution of the United States, particularly in violation of the grant of power extended to the Congress over the District of Columbia by Art. I, Secs. 8 and 9 of the Constitution, the Fifth Amendment thereto, and the "spirit" of the commerce clause, "as well as other provisions of the Constitution" (R. 2-7).

On March 28, 1949, the United States Court of Appeals reversed the decision of the Board of Tax Appeals and held "that the District of Columbia could constitutionally tax these tangibles, used exclusively in interstate commerce, upon a fair apportionment of value, but could not constitutionally tax them at full value." (R. 201.)

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered March 28, 1949 (R. 202). The jurisdiction of this Court to issue the writ applied for is invoked under Title 28, U. S. Code, Congressional Service (1948), Sec. 1254 (Act of June 25, 1948, 62 Stat. ....., ch. .....).

QUESTION PRESENTED

The question presented is whether a statute enacted by the Congress of the United States taxing *all* property at its full value, specifically including vessels, ships and boats, in the District of Columbia, is within the Constitutional jurisdiction and power of the Congress of the United States.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The United States Court of Appeals has decided a question of substance relating to the construction and application of a statute enacted by the Congress of the United States under the Constitution which has not been but should be settled by this Court. The question whether vessels, ships and boats in the District of Columbia may be constitutionally taxed under laws enacted by the Congress of the United States applicable to the District of Columbia has not been decided by this Court. This question is not applicable to the respondent only; it is applicable to all owners of vessels, ships and boats in the District of Columbia not exempted from taxation and which are used similarly to those of respondent.

2. The United States Court of Appeals has not given proper effect to the decisions of this Court with respect to what constitutes "actual situs" of tangible personal property in a taxing jurisdiction.

3. The United States Court of Appeals has decided a very important question of law concerning the Constitution of the United States and statutes enacted by the Congress of the United States which decision is in conflict with the applicable decisions of this Court and prior decisions of the Court of Appeals. In deciding this case the Court of Appeals has committed a grievous error similar to one which this Court corrected by reversing said Court of Appeals some years ago.

WHEREFORE, Your petitioner prays the allowance of a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in this cause, and that said cause may be reviewed and determined by this Honorable Court, and that the judgment of said Court of Appeals

may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

District of Columbia,
Petitioner.

By:

VERNON E. WEST,
Corporation Counsel, D. C.,

CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,

GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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OPINIONS BELOW

The opinions of the Board of Tax Appeals for the District of Columbia (R. 43-49) and the United States Court of Appeals for the District of Columbia Circuit (R. 200) are not yet reported.

GROUNDS OF JURISDICTION

The grounds on which the jurisdiction of this Court are invoked are:

1. The United States Court of Appeals has decided a question of substance relating to the construction and application of the Constitution and a statute enacted by the Congress of the United States which has not been but should be settled by this Court.

2. The United States Court of Appeals has not given proper effect to the decisions of this Court applicable to the question decided.

3. The United States Court of Appeals has decided an important question of law involving the Constitution and a statute of the United States applicable to the District of Columbia which decision is in conflict with the decisions of this Court and its prior decisions relating to the power of Congress.

STATEMENT OF THE CASE

The case, insofar as material to the question presented, is as follows:

The respondent is a Delaware corporation, organized in 1927 (R. 34). During all of the tax years involved in this proceeding (fiscal years ended June 30, 1941 to 1945, inclusive) respondent's business consisted of dredging sand and gravel from certain deposits in the Potomac River and its tributaries, transporting such material by means of scows towed by its tugs to its storage places in the District of Columbia, and thereafter selling it from such storage places and transporting it therefrom to the points of delivery, in most cases by truck and in some cases by means of scows (R. 34-36; Findings 2-7).

Respondent's only office, with the exception of its statutory office in Delaware, was in the District of Columbia. It never transacted any business in Delaware except when representatives went there to negotiate or close contracts with customers in that State, and it held some of its corporate meetings there (R. 37; Finding 11).

Respondent's shipyards, and its storage yards for the material in which it deals, are located in the District of Columbia, and were so located during the tax years involved (R. 35, 37; Findings 4, 5 12). Such repairs to respondent's scows and tugs as could not be done at the sites of dredging operations were made at respondent's shipyards in the District (R. 37; Finding 12).

The aforesaid sand and gravel was obtained by respondent from 13 sand and gravel deposits located in the Potomac River and its tributaries down-river from the District, which it owned, except that in 1941 and 1942 it also obtained sand and gravel from the vicinity of Dangerfield Island in the Potomac River. Nine of the 13 deposits were located in Maryland and 4 were in Virginia. Dredging operations at Dangerfield Island may have been carried on wholly or partly in the District of Virginia (R. 34, 36, 146; Findings 2, 7).

During the tax years concerned respondent operated the tugs and scows involved in conducting its business as fol-

lows: At the beginning of business on each working day approximately one-half of its scows were in the District of Columbia, and approximately one-half thereof were at the dredges down the river outside the boundary of the District. At about 7 o'clock A. M. at the beginning of business the unloaded scows that were in the District were towed by respondent's tugs to the sites of dredging operations. They were left there, and the tugs then proceeded to tow back to the District those scows which had been at the dredging sites overnight. The Potomac River, for about ten miles down-river from respondent's shipyards, was within the boundaries of the District of Columbia (R. 35, 36; Findings 5, 6). The process of towing the loaded scows to the District began about three or four hours after the movement of the tugs down-river with the unloaded scows. The scows arrived in the District after lunch and, after having been unloaded, were towed back to the sites of dredging operations. All of such equipment (the scows and tugs here involved) were in the District each working day (R. 35, 36; Finding 6).

Throughout each of the years involved, respondent had scows varying in number from about 65 to 87 engaged in its operations within and without the District (R. 35; Finding 6). Of these, 21 were out of the District, sunk or otherwise out of commission (R. 36; Finding 10; R. 171, 172) *and were not included in the District tax assessment;* 4 were used to furnish fuel to respondent's dredges and came into District waters every week or ten days to be loaded with fuel, remaining at other times at the sites of dredging operations (R. 36; Finding 8); and 4 were at all times outside the District engaged in stripping stumps, clay and mud from sand and gravel (R. 36; Finding 9). The 8 fuel and stripping scows were held by the Board of Tax Appeals not to be subject to taxation by the District for the years involved, and a refund of taxes and interest thereon was authorized (R. 42, 120, 121, 125-127). The re-

maining scows which were daily in the District, are those involved in this proceeding.

Respondent did not, for any of the years involved, pay any personal property taxes on its scows to Maryland, Virginia or Delaware (R. 38; Findings 15, 16). *The only scows of respondent taxed anywhere were a portion of the total number thereof, taxed by the District as shown above, which scows were daily in the District incident to the conduct of respondent's District business.*

During the tax years involved the Virginia taxing authorities taxed six dredges and eight tugs or launches belonging to respondent (R. 38; Finding 16). The basis for such taxation was that the property taxed had its "home port" in Virginia where it was registered (licensed) (R. 147, 148, 183-186). *The dredges were not taxed by the District* (R. 35; Finding 3).

Respondent did not, for any of the years involved, pay any taxes to the State of Delaware (except franchise taxes), or any personal property taxes to the State of Maryland (R. 38; Finding 16).

Respondent's treasurer pointed out to District assessing authorities in 1938 that a large part of its deliveries were outside of District of Columbia waters and that consequently, for days at a time, some of its tugs and scows were not in District waters. The Board of Tax Appeals found, however, that (R. 82; Finding 17):

> "• • • This condition as to petitioner's tugs and scows, except in regard to scows used in stripping operations and its fuel scows, did not exist during the fiscal years here involved."

During July of the years 1940 through 1945 respondent filed its personal property tax returns with the Assessor of the District for the fiscal years ending on the following June 30th and reported therein as the value of its water craft and boats the arbitrary figure of $15,000 (R. 39, 117;

Findings 18, 27, 29) which returns the Board of Tax Appeals found were "false and incorrect". The value of such property was greatly in excess of the amount reported each year (R. 41, 117; Findings 23, 28).

The Board of Tax Appeals affirmed the assessments, except with respect to the aforesaid 8 fuel and stripping scows (R. 42, 119-121).

The Court of Appeals reversed, holding that the District could not constitutionally tax the tugs and scows involved at "full value".

SPECIFICATION OF ERRORS

The United States Court of Appeals for the District of Columbia erred:

(1) In holding that vessels and boats which are daily used in the District of Columbia in the conduct of a local District business, and commingled with the general mass of property in the District, cannot constitutionally be taxed at full value.

(2) In holding that for many years the aforesaid vessels and boats have been taxed upon an apportionment of their value, and that the District could tax such property only upon a fair apportionment of value.

STATUTES INVOLVED

Act of July 1, 1902, 32 Stat. 590, 617, c. 1352, Sec. 6, Par. 1; D. C. Code 1940, Sec. 47-1203, in material part as follows:

> "That hereafter the assessor of the District of Columbia, or his successor in office, shall annually cause to be prepared a printed blank schedule of all tangible personal property * * owned or held in trust or otherwise, subject to taxation * * and of the classes of corporations and companies to be assessed, together with the rate of tax prescribed, to which shall be appended an

affidavit in blank, setting forth that the foregoing presents a full and true statement of all such personal property, * * * * * *. Every * * corporation * * in said District liable to taxation hereunder * * shall, * * fill out the proper blanks in said schedule with a full and true statement, as in this section hereinbefore required, and make and sign an affidavit to the truth thereof, * * and thereupon said board of personal-tax appraisers, or any one of the members thereof, shall assess said property at its fair cash value, and enter the same in the columns upon said blanks provided for that purpose, and the amount thus ascertained shall be entered upon the books for taxation for * * each fiscal year * *: *Provided further*, That if the said board of personal-tax appraisers be not satisfied as to the correctness of the return of personal property made by any * * corporation * * said board may reject said return, and said board, or any one of the members thereof, may, from the best information he or they can procure, or by making such an examination of the personal property as may be practicable, assess the same in such amount as may to him or them seem just; * *."

Act of July 1, 1902, *supra*, Sec. 6, Par. 2 (paraphrased as to tax rate in D. C. Code 1940, Sec. 47-1207):

"PAR. 2. On all tangible personal property, assessed at a fair cash value (over and above the exemptions provided in this section), including vessels, ships, boats, tools, implements, horses, and other animals, carriages, wagons, and other vehicles, there shall be paid to the collector of taxes of the District of Columbia one and one-half per centum on the assessed value thereof."[1]

[1] The Commissioners of the District of Columbia were authorized by the Act of June 29, 1922, 42 Stat. 668, 669, c.249 (D. C. Code 1940, Sec. 47-501), to annually fix the rate of tax.

Sec. 4 of the Act of July 3, 1926, 44 Stat. 832, 833, c. 759, D. C. Code 1940, Sec. 47-713 and 47-1202:

> "Sec. 4. That hereafter all real estate and personal property in the District of Columbia subject to taxation shall be listed and assessed at not less than the full and true value thereof in lawful money."

Act of July 1, 1902, *supra*, Sec. 6, Par. 3, as amended by Sec. 2 of the Act of April 28, 1904, 33 Stat. 563, c. 1815, a portion of which is contained in D. C. Code 1940, Sec. 47-1212. The portion of the paragraph amended reads as follows (plain type shows the language of the 1902 Act; italicized type shows the matter added by the 1904 Act):

> "After the passage of this Act it shall be unlawful for any person or persons entering the District of Columbia subsequent to June thirtieth in each year and establishing a place of business for the sale of goods, wares, or merchandise, either at private sale or at auction, *or engaging in the business of common carrier by vessels, ships, or boats,* to conduct such business until a sworn statement of the value of such stock, *vessels, ships, and boats* has been filed with the assessor of the District of Columbia, who shall thereupon render a bill for the unexpired portion of the fiscal year at the same rate as other personal taxes are levied: *Provided, That this shall not apply to vessels, ships, or boats if it shall be made to appear by affidavit that any vessel, ship, or boat has been assessed for taxation and the taxes paid elsewhere.*"

(It will be noted that the amendment relates to "common carriers" by vessels, ships, and boats; not to vessels, ships,

and boats engaged in ordinary general business such as those of the respondent in this case.)

SUMMARY OF ARGUMENT

Congress has taxed, at full value, vessels, ships and boats in the District. The vessels and boats, comprising a portion of respondent's entire fleet, were specific and individual items and were in the District throughout the tax years with exception of fractional parts of days. They were assessed at full and true value as required by law. Such vessels and boats did not visit any port except the Port of the District of Columbia. The Court of Appeals committed grievous error in holding that such property could not constitutionally be taxed at full value.

The doctrine of "actual situs" applies. Even under the doctrine of "tax apportionment" relating to migratory property habitually within a tax jurisdiction when the specific items of property are constantly changing, which the Court of Appeals sought to apply, the Court of Appeals erred under the decisions of this Court. The tax as assessed does not violate the Fifth Amendment. If the tax is assessed at less than full value as suggested by the Court of Appeals, such assessment might be held to be so discriminatory to others as to be equivalent to confiscation and void under the Fifth Amendment.

The vessels and boats involved, comprising a portion of respondent's entire fleet, were not previously taxed upon an apportionment of their value. Respondent reported its vessels and boats for taxation for many years, including the tax years involved, at the arbitrary figure of $15,000 which was considerably less than their full and true value. This is not tax apportionment under the decisions of this Court. The Court of Appeals erred in holding that the property involved had been previously taxed upon an apportionment basis based on such facts. In taxing a portion of respondent's entire fleet, which portion has been in the District throughout the tax years, there is, in a practical sense, an apportionment of the number of vessels which may constitutionally be taxed at full value.

ARGUMENT

I

The Court of Appeals erred in holding that the property involved could not be constitutionally taxed at full value.

It is clear from the findings of fact of the Board of Tax Appeals, which have been sumarized in the foregoing statement of the case insofar as here material, that the Smoot Sand & Gravel Corporation, respondent, has conducted a sand and gravel business in the District of Columbia since it was incorporated. (For a long time prior to 1922 the same business was carried on by an individual—one Smoot, Tr. 327.) Its only business office, its shipyards, and its storage yards for the material in which it deals, are all located in the District of Columbia. It is a corporation "in said District" within the meaning of the tax statute involved (*Queen City Brewing Co.* v. *District of Columbia,* 77 U. S. App. D. C. 213, 134 F. 2d 44, cert. den. 319 U. S. 767). Its "commercial domicile" was and is in the District (*First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234, 237; *International Milling Co.* v. *Columbia Transportation Co.,* 292 U. S. 511, 519; *Md. & Va. Milk Producers' Association* v. *District of Columbia,* 73 App. D. C. 399, 119 F. 2d 787, cert. den. 314 U. S. 646). Only its bare legal or statutory domicile is elsewhere (Delaware).

The hub or "home" of all respondent's commerical activities is in the District of Columbia. It has never been elsewhere.

The vessels and boats of respondent which have been taxed under laws enacted by the Congress of the United States consist of *specific* tugs and scows which were *daily in the District* throughout the tax years involved, employed in respondent's business. Such vessels and boats had become commingled with and a part of the general mass of property in the District. Such vessels and boats daily

left the Port of the District of Columbia, except when remaining in respondent's shipyards, and went to several sand and gravel deposits located in the Potomac River and its tributaries in Virginia and Maryland and returned to the Port of the District of Columbia with the material which respondent sells. So far as the record discloses, these vessels and boats went to no other "Port" but the District of Columbia. The fuel scows, which the Board of Tax Appeals held to be not subject to taxation in the District and which are therefore not involved, did infrequently visit the Port of Alexandria, Va. But, even so, the navigable water area of the Port of Alexandria was within the District boundaries. *Smoot Sand & Gravel Corp.* v. *Washington Airport*, 283 U. S. 348.[2] Regardless whether the tugs and scows here involved went to sand and gravel deposits located down-river from the District in Virginia, or Maryland, they daily were in the District.

The Congress of the United States, exercising its exclusive power to legislate for the District of Columbia under Article I, Section 8, Clause 17 of the Constitution of the United States, enacted statutes (Act of July 1, 1902, and the Act of July 3, 1926, *supra*) taxing *all* tangible personal property "in the District" (over and above property exempted [3]) at "not less than the full and true value thereof". The statute specifically includes "vessels, ships, boats," as taxable tangible personal property.

The tugs and scows here involved were clearly "vessels" and "boats". They were "in the District". They had, as the Board of Tax Appeals said (R. 45), "an actual situs and physical presence in the District throughout the entire year, with the exception of fractional parts of days." The District assessing officials assessed the taxes involved

[2] The Act of October 31, 1945, 59 Stat. 552, c. 443, establishing the Virginia-District boundary at Alexandria [illegible] "pierhead line" was enacted subsequent to any of the tax dates involved.

[3] Act of July 1, 1902, *supra*, Sec. 6, Par. 10, as amended (D. C. Code 1940, Sec. 47-1208).

based upon the "full and true value" of the specific property, as the statute requires. Other vessels and boats which were used as an integral part of respondent's business and which had acquired a situs outside the District were not assessed by District tax officials.

The Board of Tax Appeals stated in its opinion (R. 48):

> "If the holding that petitioner's equipment had a taxable situs in the District for the taxable years involved is correct, the Constitutional questions raised by petitioner as to taxation of property having no such situs are not applicable."

The Court of Appeals, in reversing the Board of Tax Appeals, concluded that the "District of Columbia could constitutionally tax these tangibles, used exclusively in interstate commerce, upon a fair apportionment of value, *but could not constitutionally tax them at full value.*" (Italics supplied.) This conclusion was reached notwithstanding the fact that only a portion of the entire number of vessels and boats of the respondent used in its sand and gravel business was subjected to District taxation, and notwithstanding the fact that the statute involved requires that such property shall be assessed "at not less than the full and true value thereof". As pointed out above, the only vessels and boats subjected to District taxation under the decision of the Board of Tax Appeals were specific tugs and scows which were daily in the District throughout the tax years involved.

In reaching its conclusion the Court of Appeals said (R. 201):

> "* * In order to be constitutional, a property tax on such tangibles must be apportioned upon some fair basis. This has been the consistent holding of the Supreme Court. * *"

All the cases cited by the Court to the statement just quoted involved State tax cases and the jurisdiction or power of the various States to tax under the limitations of the Commerce Clause of the Constitution or the Fourteenth Amendment, or both. It is well settled that the commerce clause operates as a limitation solely upon the States and constitutes no bar to action of the Congress of the United States, and that the Fourteenth Amendment is not applicable in the District of Columbia. These principles were recently announced by the Court of Appeals in *Neild et al.* v. *District of Columbia,* 71 App. D. C. 306, 110 F. 2d 246, based almost entirely upon decisions of this Honorable Court,[4] and after the case was twice argued, first by a three-judge Court and again by a five-judge Court. One of the cases cited was *Wight* v. *Davidson,* 181 U. S. 371, which was an appeal from a decree of the Court of Appeals of the District of Columbia reversing an order or decree of the Supreme Court of the District confirming an assessment upon lands for improvements made. The Court of Appeals relied upon a similar case which originated in Ohio and involved due process of law under the Fourteenth Amendment. In reversing the Court of Appeals, with directions to affirm the decree of the Supreme Court of the District of Columbia, this Court said (181 U. S. 384):

> "In the present case is involved the constitutionality of an Act of Congress regulating assessments on property in the District of Columbia, and in respect to which the jurisdiction of Congress, in matters municipal as well as political, is exclusive, and not controlled by the provisions of the 14th Amendment. No doubt, in the exercise of such legislative powers, Congress is subject to the provisions of the 5th Amendment to the Consti-

[4] And see *United States* v. *Darby,* 312 U. S. 100, as to the power of Congress under the commerce clause.

tution of the United States, which provide, among other things, that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation. But it by no means necessarily follows that a long and consistant construction put upon the 5th Amendment, and maintaining the validity of the acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the 14th Amendment as controlling state legislation."

It is respectfully submitted that the Court of Appeals has committed an identical error in the present case.

It is further respectfully submitted that, even under the tax apportionment doctrine introduced by *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18, which was extended to include ships and vessels operating on inland waters in *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169 (decided four days before the present case was argued), the Court of Appeals has grievously erred. That doctrine is not applicable to taxation of specific personal property having an "actual situs" in a tax jurisdiction, even when such jurisdiction is Constitutionally limited or restricted under the commerce clause and the Fourteenth Amendment. The rule of tax apportionment applies only where migratory property is habitually employed within a State and when the specific and individual items of property are not continuously the same but are constantly changing as the nature of their use requires. *Johnson Oil Co.* v. *Oklahoma*, 290 U.S. 158; *American Refrigerator Transit Co.* v. *Hall*, 174 U.S. 70, 82. The basis of the apportionment assessment may be such proportion of capital stock as the number of miles of route traveled within the State bears to the total number of miles in all States (the *Pullman Car Co.* case,

supra), by an appraisement and valuation of the average number of items or average amount of property habitually used and employed within the State (the *Johnson Oil Co.* case, *supra*), or by any appropriate means of reaching the "actual or full value" of the portion of the property used within a State, including intangible values (*Pullman Co.* v. *Richardson*, 261 U.S. 330). The mileage basis used in the *Pullman Car Co.* case, *supra*, was not permitted in *Union Tank Line Co.* v. *Wright*, 249 U.S. 275, because it was arbitrary and the consequent valuation of the property was grossly excessive. In the case last cited this Court held that the average number of cars used in the State during the tax year should be taxed on a basis of *true value* of the cars rather than on a mileage basis.

The Board of Tax Appeals distinguished the *Queen City Brewing Co.* case, *supra*, in deciding this case and said (R. 45):

> "* * * But the taxability of the property involved in this appeal rests not on any such 'representative' theory, or 'average' assessment, but on the fact that *the very property sought to be taxed had an actual situs and physical presence in the District throughout the entire year*, with the exception of fractional parts of days." (Italics supplied.)

This Honorable Court has held that the State of domicile has jurisdiction to tax the personal property of its corporations, unless such property has acquired an "actual situs" in another State, and that by "actual situs" is meant continuous presence in another State *which thereby supplants the home State* and acquires the taxing power over such personalty. *Union Transit Co.* v. *Kentucky*, 199 U.S. 194; footnotes 1 and 2 in *Northwest Airlines* v. *Minnesota*, 322 U.S. 292, 295, 296. Under this rule the jurisdiction of a State where the property has an actual situs is not lost

or curtailed even if every item of that property should be taken successively into another State for a day, a week, six months, or other period of time less than a tax year. *New York Central R. Co.* v. *Miller*, 202 U.S. 584; *Northwest Airlines* v. *Minnesota, supra.* Since the "domicile of actual situs" (*Southern Pacific Co.* v. *Kentucky*, 222 U.S. 63, 67) supplants the statutory domicile or domicile of origin under this rule, it makes no difference that personal property taxes have been paid upon some portion of the property in other tax jurisdictions (*Northwest Airlines* v. *Minnesota, supra*, p. 295). See also *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U.S. 409; *Old Dominion S. Co.* v. *Virginia*, 198 U.S. 299.

The *Pullman's Palace Car Co.* case and certain others decided by this Court concerning the rule of tax apportionment referred to above, distinguishing between that rule and the rule of "actual situs", had been decided before the Congress enacted the tax statute involved on July 1, 1902. As this Court so aptly pointed out in the case of *Southern Pacific Co.* v. *Kentucky, supra* (p. 75): "A ship is not intended to stay in port, but to navigate the seas." Certainly the Congress knew of the very restricted navigable water area within the boundaries of the District of Columbia when it enacted the statute involved, knew of the decisions of this Court on the subject, knew that vessels, ships, and boats (which were specifically mentioned in the statute) would necessarily have to leave the District and return in order to be useful for the purposes intended, and intended to tax such vessels, ships and boats as had an actual situs in the District at their "fair cash value" or, in other words, their "full and true value." Then, in 1904, Congress amended the law so as to tax vessels, ships and boats entering and engaging in the business of common carrier in the District, at the same rate as other tangible personal property, without regard to the "actual situs" rule, unless it appeared *by affidavit* that "any vessel, ship,

or boat has been assessed for taxation and the taxes paid elsewhere." Also, by an Act approved December 15, 1945 (59 Stat. 610, c. 579, D. C. Code 1940, Supp. VI, Sec. 47-1215), the Congress prescribed different bases for taxing rolling stock of railroads and other companies. Section (b) of that Act taxes such rolling stock as is primarily located in the District (i.e., having its "actual situs" in the District) at its "full and true value". Section (c) of that Act begins: "(c) Such rolling stock as is not primarily located in the District of Columbia shall be reported and taxed in the manner following" and then proceeds to describe in detail the manner in which the tax on such rolling stock shall be apportioned. It is therefore self-evident in the statute that Congress recognized the essential difference between personal property which had an "actual situs" in the District and should be taxed at its "full and true value" and personal property which came into the District habitually but only temporarily and, therefore, should be taxed on the "apportionment" basis. **All decisions of this Court on the subject up to and including the Northwest Airlines case, supra, had been decided prior to enactment of the Act of December 15, 1945, supra.** It is further significant to note that if the Congress had omitted Section (b) of the 1945 Act, all railroad rolling stock, whether or not it had an actual situs in the District, would have been taxed on an apportionment basis.

In view of the foregoing, the only Constitutional question presented falls within the language of the Fifth Amendment. The tax involved does not violate the Fifth Amendment and, therefore, the Court of Appeals should have affirmed the Board of Tax Appeals. Clearly neither the statute nor the assessments constitutes a taking of property without due process of law under the decisions of this Court involving both the Fifth and Fourteenth Amendments. *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24; *Stebbins* v. *Riley*, 268 U. S. 137; *Tyler* v. *United States*,

281 U. S. 497, 504; *Union Tank Line Co.* v. *Wright, supra; Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444. As a matter of fact, if the tax involved were one assessed by a State the theory of the Court of Appeals of assessing the property at less than full and true value would be repugnant to the equal protection clause of the Fourteenth Amendment (*Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 515, 516) and, even under an act of the National Congress, might possibly be so discriminatory to others as to be "equivalent to confiscation and therefore void under the Fifth Amendment" (*Hamilton National Bank* v. *District of Columbia*, 81 U. S. App. D. C. 200, 203, 156 F. 2d 843, 846).[5]

II

The Court of Appeals erred in holding that the vessels involved have heretofore been taxed upon an apportionment of value.

The Court of Appeals stated in its opinion (R. 200):

> "The question is whether the District of Columbia can levy its property tax upon the full value of these tugs and scows. For many years they have been taxed upon an apportionment of their value based upon use inside and use outside the District."

The "tugs and scows" referred to by the Court were not the *entire* fleet of vessels and boats used by respondent in its sand and gravel business within and without the District. Such tugs and scows were those which were in the District throughout the entire tax years except for fractional parts of days, as pointed out above. They constituted only a *portion* of the entire fleet. This case, there-

[5] This case is now pending decision in the Court of Appeals (No. 9833) on second appeal from the Board of Tax Appeals.

fore, is not at all like the *Johnson Oil Co.* case, *supra,* where the Supreme Court of Oklahoma sustained assessments "on the entire fleet of cars"; nor like the *Union Transit Co.* case, *supra,* where the Court of Appeals of Kentucky also sustained assessments on the "entire number" of cars used within and without the State. Both of these cases, reversed by this Court, were relied upon by the Court of Appeals in deciding this case.

The material facts which are set forth in our Statement of the Case, *supra,* are based upon findings of fact of the Board of Tax Appeals. Findings 18 and 27 (R. 39, 117) show that respondent reported its vessels and boats for taxation during the tax years involved at an arbitrary value of $15,000. The full and true values thereof as determined by the District assessor and affirmed by the Board of Tax Appeals ranged from $330,943 for the year 1941 to $198,253 for the year 1945 (Finding 23, 28; R. 41, 117). The Board pointed out that respondent, in 1938, was reporting the value of its floating equipment at $15,000 (Finding 17, R. 82). District assessors informed respondent's treasurer, about 1943 or 1944, that they did not agree with respondent's basis of reporting its boats for taxation at a valuation of $15,000 but respondent nevertheless continued to report it at such value (R. 153-155).[6] This, clearly, did not constitute an apportionment of the value of the tugs and scows referred to by the Court. The Board of Tax Appeals did not make a finding of fact that the tugs and scows involved have for many years been taxed upon an apportionment of their value. The Acts of July 1, 1902, and July 3, 1926, *supra,* do not permit taxation of vessels and boats on a basis of *apportionment* of *value.* See *Greene* v. *Louisville & Interurban R. R. Co., supra,* at p. 516, where this Court said that the basis of assessment can be full value or any

[6] The omissions of taxing officers in previous years cannot control the duty imposed by law upon their successors. *Vicksburg S. & P. R. Co.* v. *Dennis,* 116 U. S. 665, 670.

other percentage or portion thereof so long as the basis is applied *"to all alike"*.

CONCLUSION

It is respectfully submitted that the Court of Appeals grievously erred in reversing the Board of Tax Appeals.

Wherefore, we urge that the writ of certiorari be granted.

Respectfully submitted,

VERNON E. WEST,
Corporation Counsel, D. C.,

CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,

GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

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CHARLES ELMORE CROPL
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No. 780

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

DISTRICT OF COLUMBIA, *Petitioner*,

v.

THE SMOOT SAND & GRAVEL CORPORATION, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,
GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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No. 780

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

QUESTION PRESENTED

The question presented is stated on page 3 of the petition. The attempt of respondent to materially change such question, or to propound additional questions based upon assumption of facts (Resp. Br., p. 2), is improper. Rule 38, par. 2, of this Court provides that: "Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

THE FACTS INVOLVED

Petitioner, in its statement of the case (Pet. Br., pp. 7-11), set forth the *material* facts applicable to the question presented, based upon the findings of fact of the Board of Tax Appeals for the District of Columbia. Said findings of fact have not been held to be "clearly wrong". Those findings, therefore, must be accepted as correct. *District of Columbia* v. *Pace*, 320 U. S. 698, 703.

In respondent's brief in opposition, however, the clear pronouncements of this Court in the *Pace* case, *supra*, as to findings of fact of the Board of Tax Appeals have been ignored. In 17 paragraphs (Resp. Br., pp. 3-7) respondent states its alleged "basic facts involved". The findings of fact of the Board of Tax Appeals are referred to in only 2 of the 17 paragraphs (the last paragraph on page 5 and the next-to-last paragraph on page 6 of respondent's brief). All other statements of alleged facts in respondent's brief are founded upon portions of testimony, exhibits, and arguments in briefs filed with the Board. For example:

> (1) Respondent states (Resp. Br., p. 6) that during all of the years involved the "equipment in question" has been assessed for tangible personal property taxation by the Virginia authorities "and the tax so assessed has always been paid". The Board of Tax Appeals found as a fact (R. 38, Finding 16) that: "Petitioner did not pay taxes to Virginia on its scows."
>
> (2) Respondent states (Resp. Br., p. 6) that the daily average number of respondent's scows entering or berthed at the Port of Alexandria ranged from a maximum of 31 to a minimum of 2 during the years involved. The Board of Tax Appeals found as a fact (R. 37, Finding 14) that: "There was no testimony that any of these vessels, with the exception of some of the fuel scows, were ever berthed at, or visited, the Port of Alexandria."

> The Board further found as a fact (R. 36, Fnding 8) that: "Four of petitioner's scows were used to furnish fuel to the dredges", some of which came into Alexandria every ten days to be loaded with fuel oil and some of which came into Washington every week to be loaded with coal. These fuel scows were held not subject to taxation in the District and are not involved in this proceeding (R. 42). Therefore, *not one scow involved in this proceeding ever entered or was berthed at the Port of Alexandria during the tax years involved.*

The foregoing and many other similarly erroneous statements of facts are set forth in a parallel comparison in a supplement to this brief (p. 9-11).

Some of respondent's statements are followed by parenthetical references to certain exhibits and argument in briefs filed with the Board of Tax Appeals which the Court of Appeals, in disallowing costs with respect thereto after the petition for writ of certiorari was filed, stated were "wholly unnecessary in connection with" respondent's "points on review in this case" (Supp., p. 13-14).[1]

Petitioner therefore submits that respondent's statement of alleged basic facts involved should be entirely disregarded by this Court.

REPLIES TO RESPONDENT'S ARGUMENT

On page 13 of respondent's brief it is stated that: "The District of Columbia seeks to avoid the consequences of the *facts* and *authorities* which control in this case by ignoring both * *", etc. In view of what has been pointed out above, petitioner submits that the situation is contrariwise. As set forth above, and in the supplement to this brief, respondent has almost completely ignored the findings of fact

[1] "Supp." means supplement to this brief.

of the Board of Tax Appeals and stated a case from *portions* of the testimony, exhibits, and legal arguments in briefs filed with the Board. Inasmuch as the petition for writ of certiorari in this case was filed May 11, 1949, that the order of the Court of Appeals disallowing certain costs as set forth above was filed two days later on May 13, 1949, and that respondent's brief was filed some time later, on June 3, 1949, it is reasonable to assume that *respondent intentionally ignored the findings of fact of the Board of Tax Appeals.* The respondent's purpose in so doing could only be that it desires to bring itself within the four corners, if possible, of certain decisions of this Court realting to *tax apportionment* and thereby avoid this Court's decisions with respect to the *doctrine of actual situs* in tax cases of this kind.

Petitioner has discussed in its brief (Pet. Br., pp. 15-25) not only the doctrine of "actual situs" on which it relies but, as well, the doctrine of "tax apportionment" on which respondent relies, together with the question as to "due process of law", under the applicable decisions of this Court. Petitioner stated its understanding of the decisions of this Court on the rules of taxation relating to "tax apportionment" and "actual situs" as follows (Pet. Br., p. 19):

> (1) The doctrine of tax apportionment is not applicable to taxation of specific personal property having an "actual situs" in a tax jurisdiction, even when such jurisdiction is Constitutionally limited or restricted under the commerce clause and the Fourteenth Amendment; and that
>
> (2) The rule of tax apportionment applies only where migratory property is *habitually employed within a State* and *when the specific and individual items of property are not continuously the same but are constantly changing as the nature of their use requires.*

In this case the property involved had an *actual situs in the District.* Such property was *specific* and *continuously the same.* As the Board of Tax Appeals pointed out (R. 45), "the *very property* sought to be taxed *had an actual situs and physical presence in the District throughout the entire year,* with the exception of fractional parts of days." (Italics supplied.)

It appears to be respondent's contention (Resp. Br., pp. 8-12) that if tangible personal property is used in interstate commerce the doctrine of tax apportionment must be applied in lieu of the tax doctrine of actual situs. This, petitioner strongly urges, is completely erroneous and contrary to this Court's decisions in the applicable cases, particularly *New York Central R. R. Co.* v. *Miller,* 202 U. S. 584, and *Northwest Airlines* v. *Minnesota,* 322 U. S. 292.

The argument of respondent (Resp. Br., pp. 14, 15) to the effect that the Congress did not have the power to impose the property taxes here involved for the benefit of the District of Columbia is also erroneous. *Gibbons* v. *District of Columbia,* 116 U. S. 404, *Binns* v. *United States,* 194 U. S. 487, *Heald* v. *District of Columbia,* 259 U. S. 114, 124.

Respondent's argument based upon the individual remarks of a member of Congress (Resp. Br., pp. 8, 9) is, also, clearly unsound. This Court, for a long period of time, has consistently held that remarks of individual members of Congress during debate do not establish the intent of Congress. See *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 318 (1897), and *United States* v. *United Mine Workers of America,* 330 U. S. 258, 281, 282 (1947).

On page 10 of respondent's brief it is stated that "On July 17, 1945 Congress was advised by the President of the Board of Commissioners for the District of Columbia * * ", etc. Extensive argument is based thereon. No reference is given to the record where the source of the statment appears in evidence. The document of "July 17, 1945" referred to by respondent is not in evidence; it is attached as

Page 5 bad, back of page 6.

Exhibit "A" to respondent's brief filed with the Board of Tax Appeals (Tr. 78, 94), which brief was one of the items which the Court of Appeals stated in its order filed May 13, 1949, *supra* (Supp., 14, item 3), was "wholly unnecessary" in connection with respondent's points on review in this case.

Respondent also states its "understanding" as to petitioner's handling of respondent's personal property taxes in the District (Resp. Br., p. 10) and refers to "(R. 27-32, 106)". "R. 27-32" is one of respondent's exhibits and "R. 106" is part of respondent's brief filed with the Board of Tax Appeals which the Court of Appeals said, likewise, were "wholly unnecessary" (Supp., p. 14, items 1 and 3).

In connection with the two preceding paragraphs, petitioner has set forth its position with respect to taxation of rolling stock of railroads on page 22 of its brief. There is no factual or legal basis for respondent's assumption that no railroad rolling stock was subject to taxation in the District prior to the Act of December 15, 1945, 59 Stat. 610. It cannot properly be questioned that such railroad rolling stock as had an "acutal situs" in the District was subject to taxation at its full and true value prior to the 1945 Act.

CONCLUSION

It may be that the decision of the Court of Appeals in this case, which petitioner contends constitutes grievous error, resulted from a misunderstanding of the material facts. The briefs filed in that Court will show that respondent erroneously stated such facts, as has been done in respondent's brief filed in this Court.

Without regard to the apparently confused factual situation, however, if it is true as the Court of Appeals stated (R. 201), that "the District of Columbia could constitutionally tax these tangibles [see footnote 2], used exclusively in in-

[2] The Congress of the United States enacted the statutes which imposed the taxes involved.

terstate commerce," only "upon a fair apportionment of value", such situation exists only because the Court of Appeals has so decided. Congress has not declared any such rule of apportionment. On the contrary, Congress has taxed tangible personal property at its "full and true value in lawful money" which was clearly within its power. It is well-established by decisions of this Court that Constitutional limitations applicable to the taxing powers of the respective States are not limitations upon the power of Congress in legislating for the District of Columbia.

Respectfully submitted,

VERNON E. WEST,
Corporation Counsel, D. C.,

CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,

GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

SUPPLEMENT TO BRIEF

Statements of Alleged Facts in Respondent's Brief:	*Findings of Fact Made by the Board of Tax Appeals:*
1. Page 6.—"During all of the years involved the equipment in question has been assessed for tangible personal property taxation by the Virginia taxing authorities at its Registered Home Port of Alexandria, Virginia, and the tax so assessed has always been paid (Tr. 354, 363, 364, R. 30)."	1. R. 38, Finding 16—"In 1940 the Virginia taxing authorities taxed six dredges, and eight tugs or launches belonging to petitioner on the basis of an assessed value of $15,000 and petitioner paid a tax thereon. Petitioner paid the State of Virginia all of the taxes which that State assessed against floating equipment belonging to petitioner, prior to 1940 and since 1940. * * Petitioner did not pay taxes to Virginia on its scows."
2. Page 6.—"The *daily* average number of respondent's scows entering or berthed at the Port of Alexandria ranged from a maximum of 31 to a minimum of 2 during the years involved."	2. R. 37, Finding 14—"There was no testimony that any of these vessels, with the exception of some of the fuel scows, were ever berthed at, or visited, the Port of Alexandria." R. 36, Finding 8—"Four of petitioner's scows were used to furnish fuel to the dredges. Some of them came into Alexandria every ten days to be loaded with fuel oil, and some came in to Washington every week to be loaded with coal. * * The rest of their time they spent at the site of the dredging operations." (*Note.*—These fuel scows were held not subject to taxation in the District and are not involved in this proceeding. See R. 42.)
3. Page 6.—"By administrative construction the petitioner has always recognized that the District of Columbia tangible personal property tax law does not provide for taxation of the interstate water transportation equipment involved on the basis of apportionment and has expressly conceded in this case that the 'District tax statutes involved do not provide for apportionment.' (Tr. 185)."	3. This matter was not before the Board of Tax Appeals. There is no evidentiary basis for such statement. The basis for the statement, according to the reference "(Tr. 185)" is the District's brief filed with the Board of Tax Appeals wherein it was stated (not as quoted by respondent) that: "The District tax statutes involved do not provide for apportionment *such as contended for by counsel for petitioner.*" (R. 115) The italicized portion was omitted by respondent.

4. Page 6.—"Nevertheless, respondent has always paid tangible personal property tax to the District of Columbia on an equitable basis mutually agreed upon as a fair amount. * * The amount of the assessment agreed upon was revised in the early 1930's and was reviewed and approved by mutual agreement of the parties in 1938."

4. The Board of Tax Appeals did not make a finding that there was any mutual agreement between the parties as to a fair amount of tax. The Board's findings with respect to the so-called agreement of 1938 are contained in Finding 17, as amended (R. 38, 82). The Board found that a "conference" was held; not that there was any agreement in 1938. A memorandum of this conference was included in the transcript of record and printed appendix by respondent (Smoot) in the Court of Appeals (R. 27-32). The Court of Appeals, in disallowing costs with respect thereto after the petition for writ of certiorari was filed, stated that the inclusion of such memorandum "was wholly unnecessary in connection with petitioner's points on review in this case." (Supp. p. 14).

5. Page 6.—"Petitioner's own evidence (R. 85) expressly shows that 'The tangible property of The Smoot Sand & Gravel Corporation' involved in this proceeding . . is 'located outside of Washington, D. C.' at 'various locations in the States of Virginia and Maryland.'" Etc.

5. R. 82, Finding 17—"Petitioner's treasurer pointed out to the assessing authorities that a large part of its deliveries were outside of District of Columbia waters and that consequently, for days at a time, some of its tugs and scows were not in the District waters. This condition as to petitioner's tugs and scows, except in regard to scows used in stripping operations and its fuel scows, did not exist during the fiscal years here involved." (*Note.*—The fuel and stripping scows referred to were held not subject to taxation in the District and are not involved in this proceeding. See R. 42, 125-127.) The references to "(R. 85)" and "(R. 83-95)" in the last paragraph of respondent's statement (Br., pp. 6, 7) are to a motion for reconsideration and legal argument thereof filed with the Board of Tax Appeals, the argument portion of which the Court of Appeals stated was "wholly unnecessary". (Supp. p. 14).

Respondent's statement quoted opposite hereto is based upon an appraisal report dated June 14, 1940 (which was prior to any tax

date here involved), relative to the question of the *value* of the property involved (R. 164, 178, 179, 191). The question of *taxable situs* of the property involved had been previously decided by the Board of Tax Appeals (R. 42) on motion of respondent over the objection of petitioner (R. 42, 122, 123). The Board's opinion (R. 43-49) clearly shows that the question of taxable situs had been disposed of on August 11, 1947. The question as to whether the value of the property was excessive was not heard until October 8, 1947 (R. 164).

6. Page 5.—"Deliveries to the Potomac River bridge were made during the period from September 8, 1939 through June 14, 1940, and required all of respondent's steel scows and much of its remaining transportation facilities."

6. No finding of fact was made by the Board of Tax Appeals. The period of nine months referred to occurred prior to any of the tax years involved in this case.

7. Page 5.—Respondent states that its scows, tugs, and launches, during the entire period involved in this controversy, "were in Virginia and Maryland more than 58% of the time and during 1945 and 1946, when more nearly normal operations were reestablished, they were in Virginia and Maryland more than 66% and 71% of the time, respectively * *."

7. The Board made no finding as to these percentages. The Board's finding was (R. 36, Finding 6): "The nature of petitioner's operations was such that these scows and tugs usually spent more hours per day outside of the District than in the District."

8. Page 5.—"Since 1935 the principal down river deliveries on the Chesapeake Bay and its tributary system of waterways, such as the lower Potomac, Patuxent, the Rappahannock, and the Great Wicomico Rivers have been to 22 places in Virginia and 10 places in Maryland at distances from Washington as far as 182½ miles * *."

8. R. 35, Finding 4—"During all of the years here involved, petitioner's business consisted of dredging sand and gravel from these deposits, *transporting such material by means of scows, towed by its tugs, to its storage places in the District of Columbia, and thereafter selling it from such storage places* and *transporting it therefrom* to the points of delivery, *in most cases by truck* and in some cases by means of scows." (Italics supplied.)

United States Court of Appeals

For the

District of Columbia Circuit

FILED MAY 13 1949

Joseph W. Stewart
Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9827, April Term, 1949.

Smoot Sand & Gravel Corporaton,
Petitioner,

v.

District of Columbia,
Respondent.

Before Edgerton, Prettyman and Proctor, JJ.

ORDER

On consideration of respondent's motion to tax costs against petitioner and of the objections thereto, the Court is of opinion that petitioner caused to be included in the

transcript of record and in the printed joint appendix the following matter which was wholly unnecessary in connection with petitioner's points on review in this case:—

1. Petitioner's Exhibit 15, memorandum re a conference with board of Tax Appeals on July 21, 1938 (R. 509-512 incl; App. 27-32 incl)

2. Petitioner's motion to place certain issues on the trial calendar and certain issues on the reserve calendar and memorandum relating to Northwest Airlines case and memorandum in opposition to the motion (R. 23-37, incl.)

3. Briefs for petitioner and respondent and reply brief (R. 44-131, incl.)

4. Argument portion of petitioner's motion for correction of Board's findings and argument portion of respondent's memorandum in opposition to the motion (R. 142-158, incl. App. 58-74, incl) (R. 163-165, incl. App. 78-80, incl)

5. Briefs for petitioner and respondent (R. 168-186, incl. App. 96-116, incl)

6. Argument portion of motion for reconsideration (R. 188-199, incl. App. 84-95, incl.)

Most of the above-described matter consists of briefs filed in the lower tribunal, which form no part of the record, and which should not have been included in the transcript of record. See *Zadig* v. *Baldwin* 166 U. S. 485, 488; *Harding* v. *Illinois,* 196 U. S. 78, 84; *Maryland Casualty Company* v. *Jones,* 279 U. S. 792, 796. In the circumstances the petitioner will not be allowed the cost of preparing 158

pages of the transcript of record or for printing 58 pages of the joint appendix, and

IT IS SO ORDERED.

Dated May 13, 1949. Per curiam.

A true Copy,

Test: /s/ Joseph W. Stewart
Clerk of the United States Court of Appeals
(SEAL) for the District of Columbia Circuit.

No. 780

JUN 3 194

CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

DISTRICT OF COLUMBIA, *Petitioner*,

v.

THE SMOOT SAND & GRAVEL CORPORATION, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

DAVID R. SHELTON,
Munsey Building,
Washington 4, D. C.,
Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The memorandum opinion of the Board of Tax Appeals for the District of Columbia is not published (R. 43-49). The opinion of the United States Court of Appeals for the District of Columbia (R. 200) has not yet been reported.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered March

28, 1949 (R. 202). The petition for a writ of certiorari was filed May 11, 1949. The jurisdiction of this Court rests upon 28 U. S. C., Section 1254.

Question Presented.

Whether the Court of Appeals erred in holding that the District of Columbia's contention that its local tangible personal property tax law enacted in 1902 should now be extended by judicial interpretation to cover—at full value, with no apportionment—a Delaware corporation's interstate transportation facilities located primarily in Virginia and Maryland could not be constitutionally sustained.

Stated differently: Did the Court of Appeals err in failing to uphold the District of Columbia's changed interpretation made in 1945 with respect to a local tax statute enacted in 1902 when in the opinion of the Court of Appeals the application of the statute in this case pursuant to such changed interpretation is in violation of the Constitution?

Statutes Involved.

Sections 47-1201, 47-1202, and 47-701, D. C. Code 1940, provide as follows:

> Sec. 47-1201. "*Three assistant assessors to assess personal property.*
>
> The three members of the permanent Board of Assistant Assessors designated by the assessor, to assess personal property, shall under the direction and supervision of the said assessor, assess personal property in the District of Columbia as follows. (July 1, 1902, 32 Stat. 617, ch. 1352, Sec. 6 (par. 1; July 3, 1926, 44 Stat. 832, ch. 759, Sec. 1.)"
>
> Sec. 47-1202. "*Personal property to be t[illegible]d at its full value.*
>
> All personal property in the District of Columbia subject to taxation shall be listed and assessed at not less than the full and true value thereof in lawful money. (July 3, 1926, 44 Stat. 833, ch. 759, Sec. 4.)"

Sec. 47-701. "*Assessments to be made in the name of the owner.*

All real property in the District of Columbia, except as hereinafter provided, shall be assessed in the name of the owner, or trustee or trustees of the owner thereof. * * * (Aug. 14, 1894, 28 Stat. 282, ch. 287, Sec. 1.)"

STATEMENT.

The basic facts involved are as follows:

Respondent was incorporated under the laws of the State of Delaware in September 1927 and has at all times paid the franchise tax imposed by Delaware and maintained its principal office in that State at 7 West 10th Street, Wilmington, Delaware, where it conducts corporate meetings (Tr. 384, 391, App. 23). It is engaged in the business of producing, transporting, and selling sand and gravel (Tr. 327, 328, 384, 385, 419, R. 23). From 1922 until September 1927 the business was carried on by a Virginia corporation known as The Smoot Sand & Gravel Corporation of Virginia (Tr. 327, R. 27-44). Prior to 1922 the business was operated as a sole proprietorship (Tr. 327).

Production of sand and gravel is carried on by respondent in Virginia and Maryland (Tr. 255-261, 358, 359, 384, 385, 420, Ex. 1). The scows, tugs, and launches involved in this controversy are essential and integral parts of the machinery required in the production and processing of material in Virginia and Maryland (Tr. 248-250).

Transportation of sand and gravel is carried on from the points of production in Virginia or Maryland to any point or points on the Potomac River and its tributaries and the Chesapeake Bay and its tributary system of waterways in accordance with the requirements of respondent's customers (Tr. 247, 324, Exs. 1, 2, App. 26). Only 11 miles of this system of waterways extending for hundreds of miles touch upon the District of Columbia (Exs. 1 & 2).

Direction and control of both production and transportation have at all times been carried on primarily from

the State of Virginia, such direction and control being directed principally from Alexandria, Virginia, the Registered Home Port of petitioner's facilities (Tr. 248, 384, 385, 420, Ex. 7-14). The Marine Superintendent in charge of all production and transportation for respondent and the other men in its Production and Transportation Department seldom come into petitioner's Washington office and then only for a few minutes at a time (Tr. 248, 384, 385, 419).

Respondent does not own any deposits of sand and gravel in the District of Columbia and under regulations of the War Department could not dredge material from them if it did own such deposits (Tr. 358, 359, 370). Sand and gravel deposits owned by respondent are located at 13 points along the shores of the Potomac River or its tributaries in Virginia and Maryland, six being in Virginia and seven in Maryland and their distances below Washington ranging from 9½ miles to 51 miles (Tr. 255-261, Ex. 1).

Both production and transportation are often wholly within the State of Virginia, often wholly within the State of Maryland, and often wholly within the States of Virginia and Maryland without in any way touching upon District of Columbia waters (Tr. 255-261, Exs. 1, 2. R. 26). No production from respondent's deposits and deliveries to the District of Columbia were ever wholly within the District of Columbia, inasmuch as such deliveries always involved production in Virginia or Maryland and transportation in one or both States (Tr. 255-261, Exs. 1, 2).

Sales of sand and gravel were made principally in the District of Columbia, Maryland, and Virginia (Tr. 384). However, sales were also made in Delaware, New York, and other states (Tr. 384).

In the normal course of its business, respondent has carried on a large and long established "down river" business in addition to that in nearby Virginia, Maryland, and the District of Columbia (Tr. 293-294, 297, 362, Exs. 1, 2, 4, App. 26). All deliveries of sand and gravel were made

from the points of production in Virginia or Maryland with respondent's own tugs and scows (Tr. 264, 265, 311). Since 1935 the principal down river deliveries on the Chesapeake Bay and its tributary system of waterways, such as the lower Potomac, Patuxent, the Rappahannock, and the Great Wicomico Rivers have been to 22 places in Virginia and 10 places in Maryland at distances from Washington as far as 182½ miles (Tr. 247, 324, Exs. 1, 2, 4, R. 26).

Transportation of material from its deposits in Virginia and Maryland to be used in the construction of the Potomac River Bridge, 61 miles below Washington, affords an illustration of a typical down river delivery (Tr. 265-270, R. 26, Ex. 4).

Deliveries to the Potomac River bridge were made during the period from September 8, 1939 through June 14, 1940, and required all of respondent's steel scows and much of its remaining transportation facilities. Thus, such facilities came into the District of Columbia for less than a total of one week during the entire nine month period immediately preceding July 1, 1940, i. e., the first taxable period involved in this proceeding (Tr. 265-270, 297, 310, R. 26, Exs. 4, 5).

Respondent's "problem is" production "and not unloading" (Tr. 280). The actual time required to load a scow is from approximately 5 to 15 times as great—depending upon whether fine gravel, concrete sand, building sand, or tailings are being loaded—as that required to unload a scow (Tr. 288, 292, 310).

Respondent's scows, tugs, and launches have at all times been primarily located in Virginia and Maryland in every sense of the term primarily. The Board found as a fact and held that these instruments of production in Virginia and Maryland and of water transportation employed in interstate commerce spent more time in Virginia and Maryland than they did in the District of Columbia (R. 36, 43). During the entire period involved in this controversy, they were in Virginia and Maryland more than 58% of the time and during 1945 and 1946, when more nearly normal operations were reestablished, they were in Virginia and Mary-

land more than 66% and 71% of the time, respectively (Tr. 54-59, 309-311, 270-283, 293, 315, 318, Exs. 5, 6).

During all of the years involved the equipment in question has been assessed for tangible personal property taxation by the Virginia taxing authorities at its Registered Home Port of Alexandria, Virginia, and the tax so assessed has always been paid (Tr. 354, 363, 364, R. 30). The *daily* average number of respondent's scows entering or berthed at the Port of Alexandria ranged from a maximum of 31 to a minimum of 2 during the years involved. (Exhibits 5 and 41 and Tr. 274, 277, 324, 364). The Virginia taxing authorities examined the scows for the purpose of increasing the assessments and it has always been respondent's understanding that the scows, along with its other items of floating equipment, were included in the assessment of tax paid each year to the State of Virginia (Tr. 354, 363, 364, and R. 30).

By administrative construction the petitioner has always recognized that the District of Columbia tangible personal property tax law does not provide for taxation of the interstate water transportation equipment involved on the basis of apportionment and has expressly conceded in this case that the "District tax statutes involved do not provide for apportionment." (Tr. 185). Respondent was advised by competent counsel that its transportation facilities here involved and engaged in interstate commerce were not subject to taxation under the terms of the District of Columbia law (Tr. 349, 350, 351, 352, 385, 386, 392).

Nevertheless, respondent has always paid tangible personal property tax to the District of Columbia on an equitable basis mutually agreed upon as a fair amount (Tr. 337-344, 352, 400, 401, 407, R. 27-32). The amount of the assessment agreed upon was revised in the early 1930's and was reviewed and approved by mutual agreement of the parties in 1938 (R. 27-33).

Petitioner's own evidence (R. 85) expressly shows that "The tangible property of The Smoot Sand & Gravel Cor-

poration" involved in this proceeding was "located outside of Washington, D. C." at "various locations in the States of Virginia and Maryland." (Tr. 569-623). Petitioner's own evidence further expressly shows (a) the construction of respondent's transportation facilities in Virginia, Maryland, and elsewhere outside the District of Columbia, (b) respondent's production of all material from "extensive sand and gravel deposits in the States of Maryland and Virginia," (c) respondent's stock piling of approximately one quarter million cubic yards of material outside the District of Columbia after production in Virginia and Maryland, (d) respondent's unloading facilities at Occoquan, Virginia, and Alexandria, Virginia, and (e) additional equipment owned by the respondent at other places along the Potomac River in Virginia and Maryland (R. 83-95, Tr. 569, 623).

ARGUMENT.

I.

There is Clearly No Special or Important Reason for Certiorari in This Case.

It is respectfully suggested that there is no semblance of an adequate ground for the issuance of a writ of certiorari in this case. Obviously, the case involves only the taxation of property engaged in interstate commerce under a highly specialized, if not wholly unique, factual situation.[1] It is believed that the decision of the Court below affects only the taxpayer involved in this proceeding. Consequently, it seems clear that there is no special or important reason for certiorari in this instance.

Moreover, the decision of the Court below is correct. No other result could have been reached because (1) the local

[1] Rail carriers and common carriers by water are taxed by the District of Columbia under entirely different statutory provisions —all of which seemingly comply with Constitutional requirements of due process of law. See D. C. Code 1940, Sections 47-1215 and 47-1212.

statute involved imposes District of Columbia tax only on property that is "in" the District of Columbia on such a basis of permanency that it is out of and beyond the taxing jurisdiction of the States and (2) imposition of District of Columbia tangible personal property tax *at full value—with no apportionment*—on scows, tugs and launches of a Delaware corporation employed in interstate commerce and located primarily in the States of Virginia and Maryland would be in violation of the Constitution.[2]

II.

The 1902 Statute Involved Does Not Impose the Tax in Controversy. This Has Heretofore Always Been Conceded and the Tax in Question Was Exacted for the First Time in 1945.

The present tangible personal property tax law for the District of Columbia was enacted in 1902 after the 1877 law had been declared inoperative. Congressional Record, 57th Congress, Page 4896, *et seq.* It will be noted that Congress imposed the tangibles tax on personal "property *in* the District of Columbia" in the identical language used for the taxation of real "property *in* the District of Columbia." D. C. Code 1940, Sections 47-1201, 47-1202, and 47-701.[3]

From the legislative history of the 1902 law it is clear that Congress taxed for the District of Columbia only prop-

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[2] The decision of the Court of Appeals is clearly correct on the grounds stated and, therefore, the Court did not find it necessary to pass upon either the statute of limitations or valuation issues. See R. 3-7, 97-105, and 110-112.

[3] In this respect it appears that the District's statute by its terms in substance continued for territory ceded from Maryland the requirement that only tangibles "permanently located" in the State are subject to taxation. Maryland Code, Art. 1, Sec. 6. It is to be contrasted with the all inclusive terms of the Virginia law (Constitution of Virginia, Art. 12, Sec. 68 and Tax Code of Virginia, Sec. 283), as well as the all inclusive provisions of the Minnesota Statute (Sec. 272.01, Minnesota Statutes 1941) under which *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 88 L. Ed. 1283 (1944) arose.

erty that was out of the taxing jurisdiction of the States, i.e., the imposition was made only on "taxable wealth" that was "in" the District of Columbia *on such a basis of permanence as to be out of and beyond the taxing jurisdiction of the States.* It is plain that Congress had no desire to impose District of Columbia tangible personal property taxation on property that was subject to the taxing jurisdiction of the States represented in Congress. Thus, in the course of debate on the 1902 law in the 57th Congress, the following appears at page 4951 of the Congressional Record:

> "Mr. Benton. I yield to the gentleman from Missouri (Mr. De Armond) thirty minutes or so much thereof as he may desire.
>
> "Mr. De Armond. Mr. Chairman, the question which is now before the committee and which will later come before the House would seem to the uninitiated to be a very simple one. It is whether personal property *in* the District of Columbia shall be subject to taxation *as is personal property in the States.* * * *
>
> "The people who are to be attracted here by exemption from taxation, it must be supposed, are to come mainly from the different States of the Union—*States having in this body their representatives and at the other end of the Capitol their Senators.* Every rich man who is to be attracted to Washington by exemption from taxation is a man whose personal *property is to be taken out of the taxable wealth of the neighborhood in which he now lives.* In other words, each vote and every act here to entice these men from the States in which they now dwell to the city of Washington is an effort, and, if accomplished, will be a deed, *to take from the taxable wealth of the several communities represented here* and to add it to the non taxable wealth of the great national capital."

In 1945 the District of Columbia confirmed its then understanding and our present understanding of the congressional purpose in enacting the 1902 statute here involved.

On July 17, 1945 Congress was advised by the President of the Board of Commissioners for the District of Columbia that it was felt that railroad rolling stock had not been covered by the 1902 law and could be taxed by the District only on the basis of "specific statutory authority". Congress agreed and, accordingly, in 1945 enacted Section 47-1215 of the District of Columbia Code to cover the taxation of railroad rolling stock both "primarily located in" and "not primarily located in the District of Columbia," the latter being covered by carefully detailed provisions for just and equitable apportionment spelled out in the statute.[4]

It is our further understanding that in the administrative handling of this taxpayer's own personal property taxes the District of Columbia has always heretofore conceded that the District law did not impose tax upon instruments of water transportation employed in interstate commerce which were primarily located outside the District and subject to taxation in Virginia and Maryland. (R. 27-32, 106). Thus, *the District of Columbia's position in this case represents a complete reversal of long standing administrative construction without any change in the law whatsoever.*

We do not know of either justification or explanation as to why the District of Columbia advised Congress in July of 1945 that it "is believed that before" railroad rolling stock engaged in interstate commerce "of the kind included in this bill may be taxed, *there must be specific statutory authority therefor,*" but in August of 1945 made the assess-

[4] If Congress had intended the 1902 statute here involved to apply to tangibles employed in interstate commerce which were subject to taxation in any State or States, it would have (a) used other than real estate taxing language and (b) provided for equitable apportionment. *Cf. Queen City Brewing Co.* v. *District of Columbia*, 134 F. (2d) 44 (1943), *certiorari denied*, 319 U. S. 767, 87 L. Ed. 1716 (1943). That Congress was fully aware of the limitations of the 1902 statute covering tangibles is shown by its enactment of the District statute covering intangibles "wherever located", with the added provision, however, that if tax were paid "in some other jurisdiction" the District intangibles tax would not be imposed. D. C. Code 1940, Sec. 47-1205.

ments involved in the instant case against instruments of water transportation employed in interstate commerce *without any statutory authority therefor—and with no apportionment.*

III.

The District of Columbia's Contention That Its Tangibles Tax Enacted in 1902 Should Now be Extended by Judicial Interpretation to Cover—at Full Value, With No Apportionment—a Delaware Corporation's Interstate Transportation Facilities Located Primarily in Virginia and Maryland, if Sustained, Would Obviously Render the 1902 Law Unconstitutional.

There can be no question that respondent's scows, tugs, and launches have at all times been primarily located in Virginia and Maryland in every sense of the term primarily. Their sole and only function or purpose is to produce sand and gravel from respondent's deposits in Virginia and Maryland and transport such material wherever its customers' needs require. The deposits from which the material is produced in Virginia and Maryland wholly determine the location of its production and transportation facilities in those states and its customers' needs, whether at the Pentagon Building in Virginia, whether at Alexandria, Virginia, whether in the District of Columbia, whether at the Potomac River Bridge, Leonardtown, Tappahannock, or elsewhere in Virginia or Maryland, wholly determine the points to which deliveries are made. The deposits from which the material is produced, however, constantly remain in Virginia and Maryland and the transportation facilities —controlled and directed principally from Alexandria, Virginia—are always returned to those deposits as promptly as possible because they have no purpose, use or function whatsoever except in connection with production at and transportation from those deposits.

The legal principles that control in this case may be summarized as follows:

> The domiciliary state of incorporation "remains the permanent situs" for taxation of tangible "personal

property which has not acquired an actual situs elsewhere" by virtue of its presence and use in another jurisdiction. When movable equipment "is habitually employed in several states * * * it cannot be said that any of the states is entitled to tax the entire" value thereof "regardless of" its "use in the other states" but can tax only on the basis of just and equitable apportionment "which is consistent with the like jurisdiction of other states". The doctrine of "tax apportionment in these interstate commerce situations" is the "basis" on which "the tax laws have been framed and administered" and such "doctrine of tax apportionment * * * forming a part of the organic life of these states" is "a part of the taxing systems of this country" and "the rule of apportionment * * * has established itself in regard to" land and water commerce. The tax must be "duly apportioned" in accordance with a "fair method of apportionment" whereby the tax imposed in each jurisdiction "cannot be duplicated" or "repeated by any other state" so that an instrument of "interstate transportation" will not be required to "bear more than a fair share of the cost of" each "local government whose protection it enjoys". Due process requires that "the tax in practical operation" shall have "relation to opportunities, benefits, or protection conferred or afforded" and such "requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State." *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653, 68 S. Ct. 1238, 92 L. Ed. 1633 (1948), *Memphis Natural Gas Company* v. *Stone*, 335 U. S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832 (1948), *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 88 L. Ed. 1283 (1944), *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 82 L. Ed. 823 (1938), *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193, 80 L. Ed. 1143 (1936), *Johnson Oil Refining Co.* v. *Oklahoma*, 290 U. S. 158, 78 L. Ed. 238 (1933), *New York C. & H. R. R. R. Co.* v. *Miller*, 202 U. S. 584, 50 L. Ed. 1155 (1906), *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 39 L. Ed. 311 (1895), *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613 (1891), *Marye* v. *Baltimore & O. R. R. Co.*, 127 U. S. 117, 32 L. Ed. 94 (1888), *Queen City Brewing Co.* v.

District of Columbia, 134 F. (2d) 44 (1943), Cert. denied 319 U. S. 767, 87 L. Ed. 1716 (1943), *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949).

The District of Columbia seeks to avoid the consequences of the *facts* and *authorities* which control in this case by ignoring both and relying upon its wholly untenable "commercial domicile" argument just as though intangibles instead of tangibles were involved. And its commercial domicile argument is made here, as it was below, without even citing—much less discussing—this Court's opinion in *Wheeling Steel Corporation* v. *Fox, supra,* which settles the point against the District.[5]

The three cases relied upon by the District of Columbia in support of its commercial domicile argument clearly illustrate its utter lack of support. These cases are *Md. & Va. Milk Producers Ass'n* v. *District of Columbia,* 73 App. D. C. 399, 119 F. 2nd 787 (1941), *International Milling Co.* v. *Columbia Transportation Co.*, 292 U. S. 511, 54 S. Ct. 797, 78 L. Ed. 1396 (1934), and *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234, 57 S. Ct. 677, 81 L. Ed. 1061 (1937).

In *Md. & Va. Milk Producers Ass'n.* v. *District of Columbia, supra,* the Court was dealing with the taxability of intangibles and quite properly held that as to intangibles a commercial domicile may serve as a basis for taxation under the authority of *Wheeling Steel Corporation* v. *Fox, supra.*

In *International Milling Co.* v. *Columbia Transportation Co., supra,* it was held that a Delaware corporation having its principal place of business in Ohio and operating ships in Minnesota "not merely occasionally, but by long continued practice" was subject to suit in Minnesota. The case seems to have no possible bearing on the problem here.

[5] If the question of commercial domicile as to respondent's scows, tugs, and launches were of importance in this case it would seem that the registered home port of Alexandria, Va., from which direction and control of the equipment is principally carried on, would have an equal or greater claim than the District of Columbia.

In *First Bank Stock Corp.* v. *Minnesota, supra,* it was held that a Delaware corporation having its commercial domicile in Minnesota was subject to the latter state's intangibles tax with respect to stock certificates owned and kept in Minnesota under the authority of *Wheeling Steel Corporation* v. *Fox, supra.*

Clearly, the District of Columbia finds no support in the decided cases for its commercial domicile argument in this case. The applicable provisions of the Constitution make it plain why no such support can be found.

Article I, Section 8 of the Constitution grants to Congress exclusive legislative power over the District of Columbia as follows:

> "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dockyards, and other needful Buildings."

Certainly, it is self-evident that the Constitution did not empower Congress to impose tangible personal property taxes for the benefit of the District of Columbia—at full value, with no apportionment—on personality having a taxable situs on the basis of apportionment or otherwise, in any state or states.

Article I, Section 9 of the Constitution provides as follows:

> "No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

It has long been settled that Congress could not impose an *ad valorem* tax on tangible personal property subject to taxation in the states, unless in proportion to the census

even for the benefit of the Federal government itself. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 39 L. Ed. 759, 810, 811, 816 (1895) rehearing 158 U. S. 601, 39 L. Ed. 1108, 1119, 1125 (1895). *A fortiori*, Congress could not impose for the benefit of the District of Columbia a direct tax of any nature against the full value of tangible personal property subject to taxation in the States and belonging to a corporation created by one of the states. Just as surely as the States retained no power to impose tax on an agency of the United States (*M'Culloch* v. *Maryland* (1819), 4 Wheaton 316, 4 L. Ed. 579), it would seem that they did not by the Constitution authorize Congress to impose *ad valorem* tax within the states for the benefit of the District of Columbia (*Cf. Fargo* v. *Hart*, (1904) 193 U. S. 490, 499, 500, 48 L. Ed. 761, 765).

Clearly, the due process of law requirements of the Fifth Amendment apply to the District of Columbia and protect the respondent against the exaction involved in this case. *Ott* v. *Mississippi Valley Barge Line Co., supra.*

CONCLUSION.

The opinion of the Court below is correct. The issue involved is one of very limited local application. There is no conflict of decision. The petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID R. SHELTON,
Munsey Building,
Washington 4, D. C.,
Counsel for Respondent.